PURPOSE: This document is respectfully submitted as public comment on the Proposed Final Judgement in United States v. Microsoft pursuant to the Tunney Act.

QUALIFICATIONS: The author has technical and managerial experience in Information Technology covering large mainframe to Unix mid-range to PC systems extending over more than three decades. This experience has been in private industry but also includes part-time involvement in independent consulting and providing advice for friends. The author holds the Microsoft Certified Systems Engineer (MCSE) certification.

SUMMARY: In its current form, the Proposed Final Judgement fails every remedy objective provided by The Supreme Court. Therefore, it should be rejected and stringent interim conduct restrictions applied.

DISCUSSION: Microsoft was tried and found guilty of violating sections 1 and 2 of the Sherman Antitrust Act. The findings were upheld under appeal. The current task is to determine appropriate remedies.

In 391 U.S. 244, The Supreme Court provided criteria for the remedies in antitrust cases:

"It is of course established that, in a 2 case, upon appropriate findings of violation, it is the duty of the court to prescribe relief which will terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future. . . . The trial court is charged with inescapable responsibility to achieve this objective . . . ."

First, let me acknowledge my disappointment at the loss of structural remedies. Microsoft has been extremely innovative with interpreting conduct restrictions in the past (Civil Action No. 94-1564, http://www.usdoj.gov/atr/cases/f1300/1329.htm). Given such past behavior, only an extremely tight and well designed (both technically and legally) document only containing conduct restrictions will be effective.

The structure of the Proposed Final Judgement (PFJ) is as follows:
    I.Jurisdiction
    II.Applicability
    III.Prohibited Conduct

Nowhere does the PFJ address "deny to the defendant the fruits of its
statutory violation." Although section III discusses conduct
restrictions, there is no language to "terminate the illegal monopoly"
and ensure no "monopolization in the future".

Rather, the current PFJ serves to acknowledge, strengthen and continue
the monopoly. Section III, A deals with not retaliating against OEMS.
Starting with III, A, 2
    "shipping a Personal Computer that (a) includes both a Windows
    Operating System Product and a non-Microsoft Operating System, or
(b)
    will boot with more than one Operating System;"
Conspicuous by its absence is considering the possibility of shipping a
Personal Computer with only one non-Microsoft Operating System or no
Operating System at all. Even more interesting to note is the last
paragraph:
    "Nothing in this provision shall prohibit Microsoft from providing
    Consideration to any OEM with respect to any Microsoft product or
    service where that Consideration is commensurate with the absolute
    level or amount of that OEM's development, distribution, promotion,
or
    licensing of that Microsoft product or service."
Although retaliation is prohibited, this paragraph provides the
necessary loophole by allowing selective Consideration. This appears to
be a variation on the theme of vendors providing a cash discount when
they were prohibited from applying a credit card surcharge. In both
cases the same result is achieved.

The open source initiative has been a nemesis to Microsoft. Unlike, a
traditional profit oriented business, the usual tactics haven't worked
to eradicate them. The design of the PFJ appears to be geared to assist
in this objective starting with the explicitly named list of commercial
type organizations in section III, D. An explicitly named list
inherently excludes anything not listed. This is further emphasized in
III, J, 2, b-d:
    "(b) has a reasonable business need for the API, Documentation or
    Communications Protocol for a planned or shipping product, (c) meets

    reasonable, objective standards established by Microsoft for
    certifying the authenticity and viability of its business, (d)
agrees
    to submit, at its own expense, any computer program using such APIs,

    Documentation or Communication Protocols to third-party

verification,
    approved by Microsoft . . ."
Open source initiatives tend to be non-commercial projects whose source
code results are freely published on the Internet. They clearly fail b)
and c) since they do not have traditional business plans. They could
not afford d), which is unnecessary anyway, since the source code is
readily available. The references to RAND (reasonable and
non-discriminatory) licenses (the subject of serious debate in the W3C
standards approval process) fall in this same category. The open source
initiatives could all be rendered obsolete merely by selectively
changing the APIs to be incompatible with the current ones and
leveraging the PFJ and the DMCA to prevent access to the information
necessary to attain compatibility. In one easy move, the open source
problem is eliminated with a release change. This could spell the end
of projects such as WINE (a project to run Windows applications on
non-Windows Operating Systems) and Samba (a project to provide Windows
type file and print services on non_Windows Operating Systems and to
connect to Windows hosted file and print services from non_Windows
Operating Systems).

The PFJ is fraught with loopholes. This document discusses just a few.

CONCLUSION: The general tone of the PFJ merely acknowledges that
Microsoft is a monopolist rather than serving to "terminate the illegal
monopoly" and ensure no "monopolization in the future" as well as not
addressing "deny to the defendant the fruits of its statutory
violation." The PFJ in its current form is grossly inadequate. A major
overhaul is required to meet the stipulated criteria. The court should
reject it.

Should the current PFJ be adopted, no business would attempt to compete
with Microsoft in any area Microsoft has an interest. Should anyone be
foolish enough to do so, there would be no external funding available
due to the enormous risk of failure. This document will not serve to
restore competition.

Given Microsoft's past behavior, significant interim conduct
restrictions should be applied to temper future damage pending the
probable lengthy resolution of this matter.

SIGNATURE:
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